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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

74-1251

No. .....

BORIS THOMAS, Individually and as a member of a class,
Petitioner,

v.

FORD MOTOR COMPANY, a Delaware corporation and INTERNATIONAL UNION UAW, a union organization, and LOCAL 600, UAW, a union organization,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

1. Harrell Alexander, Sr., v. Gardner-Denver Co., 415 U.S. 36 (1974)

POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES

BORIS THOMAS,

Petitioner, No. 74-1272

-v-

FORD MOTOR COMPANY, a Delaware corporation and INTERNATIONAL UNION UAW, a union organization, and LOCAL 600, UAW, a union organization.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, BORIS THOMAS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 13, 1975.

OPINIONS

The Opinion of The Court of Appeals is unreported but appears in

the appendix hereto. The District Court Opinion also appears in the appendix and also is unreported.

STATUTORY PROVISIONS INVOLVED

This suit is brought pursuant to Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S. Code 2,000 et. seq.

JURISDICTION

January 13, 1975, the Court of Appeals for the Sixth Circuit entered its judgment affirming the District Court's November 7, 1973, dismissal of Petitioner's claim. The jurisdiction of this Court is invoked pursuant to 28 U.S. Code 1254 Sub-Section 1, et. seq., and relief is souqht from this Court as provided under Supreme Court Rules, Rule 19 Section (b).

QUESTION PRESENTED

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDE A FEDERAL QUESTION IN CONFLICT WITH THE APPLICABLE DECISION OF THIS HONORABLE COURT TO-WIT: HARRELL ALEXANDER, SR., v. GARDNER-DENVER COMPANY, NO. 72-5847 FEBRUARY 19, 1974, WHEN IT AFFIRMED THE JUDGMENT OF THE DISTRICT COURT DISMISSING PETITIONER'S TITLE VII AND PERSONAL ACTIONS IN THE MATTER OF BORIS THOMAS, PLAINTIFF-APPELLANT v. FORD MOTOR COMPANY, A DELAWARE CORPORATION, AND INTERNATIONAL UNION, UAW, A UNION ORGANIZATION, NO. 74-1272 DECIDED AND FILED JANUARY 13, 1975.

STATEMENT OF THE CASE

February 21, 1971, a blast furnace in the Steel Division of the Ford Motor Company shut down for repairs until May 3, 1971, a period of seventy-one (71) days.

Your Plaintiff-Appellant, an electrician, and others were reassigned to the cold mill. Some affected employees were sent to skilled

labor pools, and others were put on a seventy-one (71) day "temporary" lay-off, all contrary to the collective bargaining agreement between the Defendant-Appellees of which contract your Plaintiff-Appellant and members of his class are third-party beneficiaries.

May 3, 1971, when the furnace was re-started, those employees who had been on "temporary" lay-off were re-called to their former jobs, and those who had been sent to the skilled labor pools were re-called to their former jobs, but your Plaintiff and black employees were not recalled to their former jobs. Instead, their former jobs were put up for bid which process denied them their former high incentive wages.

Your Plaintiff-Appellant protested but the Union refused to prosecute a grievance on his behalf. Whereupon, your Plaintiff-Appellant prosecuted his own grievance, exhausted his administrative remedy, and initiated his personal action in Federal District Court.

Your Plaintiff also filed a charge of discrimination with the Equal Employment Opportunity Commission pursuant to Title VII (which charge is still pending and unresolved) and on March 2, 1973, was issued a letter of Notice of Right to Sue Within Ninety (90) Days.

Your Plaintiff initiated a Title VII class action in Federal District Court within the ninety (90) day period. The two causes of action were

consolidated for trial upon Motion of the Defendants. The Defendant Unions have never filed answers to the complaints. Plaintiff's subpoenae duces tecum were served upon Defendant's agents, but the Court chose to proceed on Defendant's motion for Summary Judgment and dismissed Plaintiff's action without discovery, without affording Plaintiffs the opportunity to present factual evidence, and without a trial on the merits.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN HARRELL ALEXANDER, SR., v. GARDNER-DENVER COMPANY, 415 U.S. 36, 1974 which was cited in Plaintiff-Appellant's brief and argued and invoked before the Court of Appeals.

The Court of Appeals attempted to distinguish the case on the grounds that Harrell Alexander, Sr., supra did not preclude the trial and Appellate Courts from disposing of an action by Summary Judgment if such proceedings are otherwise justified by the record.

That Plaintiff's complaints state a cause of action was acknowledged by both the trial and appellate courts (p. 12) Sixth District Court Decision.

> "Standing alone, the complaint states a claim for relief."

The trial and appellate courts denied an opportunity to prove the allegations setforth in the complaint by granting summary judgment pursuant to Rule 56 prior to discovery, the same as was done in the case Harrell

Alexander, Sr., v. Gardner-Denver Company, supra. For the foregoing reason, Plaintiff-Appellant applies to this Court for relief as provided under The Supreme Court Rules, i.e. Rule 19 Section (b).

CONCLUSION

Plaintiff prays this Court grant certiorari or remand this case to the trial court for discovery and trial on the merits, and prays that this Court Reverse the Decision of the Court below, which Decision failed to follow this Court's opinion in Harrell Alexander, Sr., v. Gardner-Denver Company.

Respectfully submitted,

APPENDIX

NOT FOR PUBLICATION

No. 74-1272

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BORIS THOMAS,
Plaintiff-Appellant,

v.

FORD MOTOR COMPANY, a Delaware corporation and INTERNATIONAL UNION, UAW, a union organization and Local 600, UAW, a union organization,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed January 13, 1975.

BEFORE: PECK, LIVELY and ENGEL, Circuit Judges.

LIVELY, Circuit Judge. This is an appeal from summary judgment entered in favor of all defendants by the district court. Plaintiff is a long-time employee of Ford Motor Company (Ford) who was working as an electrician in the slab mill of the Ford rolling mill unit when the shut down of a blast furnace caused a reduction in personnel needs beginning February 22, 1971. The employment rights of the various workers affected by the shut down were determined by the provisions of a "local agreement" which was entered into by Ford and the Union[1] effective December 21, 1970. The local agreement was amplified by several letter contracts.

[1] The International and Local will be referred to collectively throughout this opinion as the Union.

As a result of the shut down a number of employees with lower seniority than that of plaintiff were laid off until approximately May 3, 1971. Although he was not laid off and was able to continue to work during the entire period of the shut down, plaintiff charged in his complaint that he was the victim of discrimination in that persons with low seniority were permitted to take a lay off of approximately 75 days and return to high-incentive-area jobs, whereas he and others in the same unit who had higher seniority were required instead to "bump" within the steel division and in effect lost their seniority in the slab mill.

Plaintiff instituted grievance procedures, and also filed three complaints with the Equal Employment Opportunity Commission (EEOC) on the basis that several of the high-seniority electricians who lost their slab-mill seniority were black, although plaintiff himself is white. Plaintiff's grievance was denied and when the Union refused to prosecute it further he appealed both within the Union and to the Public Review Board which is made up entirely of public members having no connection with the Union. He also filed a complaint with the National Labor Relations Board. The Regional Director and the General Counsel of the Board found that the evidence submitted by Thomas was "insufficient to establish that the Company and Union conspired to discriminate against you by an unfair application of the seniority rules, or to sustain the burden of proving that the Union failed to fairly represent you by not fully processing your grievance." The only result of plaintiff's charges with EEOC was that the Commission issued a "right to sue" letter.

Plaintiff filed two actions in the district court, naming both Ford and the Union as defendants in both actions. The first suit was an action brought under Section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185. The second suit was brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq.; 42 U.S.C. §§ 1981 and 1983; and the Equal Protection Clause of

the Fourteenth Amendment. The underlying charge in both complaints is that the local agreement of December 21, 1970 provided illegal deviations from the terms of the collective bargaining agreement (master contract) in force between Ford and the Union. More specifically, it was claimed in both complaints that Article VIII § 21 (Section 21) of the master contract permitted temporary lay offs other than for model changes only for periods of 12 days or less. Insisting that the reductions which were required by the shut down of the blast furnace were "temporary lay offs" within provisions of Section 21, the plaintiff claimed that provisions in the local agreement for dealing with a lay off of approximately 75 days were contrary to the terms of the master contract and were not permitted under it.

In the action brought under LMRA, § 301, the plaintiff sought damages and an order restoring him to his former high-incentive job. In the Title VII action, plaintiff sought a declaratory judgment that the defendants had "unlawfully discriminated against Plaintiff, Negro employees and others of the Ford Motor Company at the Rouge Plant Steel Division in Dearborn, Michigan, and that Defendant Union violated its duty of fair representation to these same workers." The complaint also sought injunctive relief. The district court consolidated the actions for trial. The defendant Ford answered the first complaint and filed a motion to dismiss both complaints after they had been consolidated. The Union filed a motion to dismiss, accompanied by an affidavit together with a number of documents and a suggestion that the court treat the motion to dismiss as a motion for summary judgment. The plaintiff filed a "Brief and Answer" to each of the motions to dismiss. No counter affidavit or documentary evidence of any kind was filed by the plaintiff.

No testimony was taken in either case, but the court held three hearings in the consolidated actions. The position of the defendants, supported by various documents which accompanied the affidavit of the Union, was that Ford and the

Union had made a permissible special arrangement for the reduction in employment occasioned by the shut down of the blast furnace and that it in no way contravened the master contract or the seniority rights of the plaintiff. At the conclusion of the second hearing, the District Judge addressed counsel for the plaintiff and specifically asked if he was satisfied that he had furnished appropriate responses to each point raised by the defendants. Counsel replied that the points had been well covered in responsive fashion in his answer. The court then advised that he would take the matter under advisement and decide it. This hearing occurred on August 13, 1973.[2] On November 1, 1973 the court conducted a further hearing in chambers, which was reported. At that hearing the court asked counsel for the plaintiff if he had any further papers to submit, and he replied that he did not. The court remarked that he had not indicated yet whether he would consider matters outside the record and decide the case under Rule 56 and stated that the purpose of the hearing was to afford "an opportunity —." At this point, counsel for plaintiff broke in and stated: "We have nothing else, Your Honor." The court then announced that he would proceed to regard the motion to dismiss as a motion under Rule 56 and dispose of it. Thereafter the court granted summary judgment to both defendants and filed a memorandum opinion in which he treated all of the issues thoroughly. We affirm.

On appeal, plaintiff states that the issue is whether the district court could enter summary judgment "when Plaintiff has had no opportunity to adduce proofs to sustain his allegations, even though witnesses had been subpoened, but no discovery had and no trial *de novo was* held?" (sic) On May 25, 1973 the plaintiff gave notice to take depositions of a Ford labor relations representative and several union representatives in the rolling mill unit. The depositions were set for June 5, 1973, but were never taken. The only explanation for this

[2] The transcript shows that the hearing was held on January 22, 1974. The reporter has certified that this is an error.

which appears in the record is a letter from the assistant general counsel of the Union to plaintiff's attorney which states in part: "Based on our previous understanding that discovery would wait until the judge rules on our motions to dismiss the above cases, I have advised those subpoenaed not to appear on June 5." Since no protective order was issued, it would appear that the plaintiff did not take the depositions because of an agreement to defer them until after the court had ruled.

At the June 25th hearing the attorney for the plaintiff stated that "the proper response on the factual issue is some discovery as to the qualifications and seniority of the skilled electricians in February." The court also indicated that it required discovery to clear up a factual dispute as to whether different conditions existed in March 1971 which were responsible for a different handling of a reduction in work forces which took place in the same work unit at that time.

At the August 13th hearing counsel for Ford stated that he had furnished plaintiff's counsel with the materials upon which the NLRB had made its determinations. Referring to Ford's position at the previous hearing that different circumstances in March 1971 justified a different method of dealing with force reductions than that employed in February, counsel for plaintiff stated:

> We believe that none of those circumstances allows a deviation which he alleges in his letter, and we believe that there is no provision for such a thing as a 75-day temporary layoff, as – or longer temporary layoff, as occurred, and that the factual claim is sufficient for us to go into a discovery stage, and document, at great length, exactly the – the basis for damages.

Counsel for Ford responded that even if it were assumed that everything in the complaint were true there would be no factual dispute because the admitted actions of Ford and the Union did not constitute a violation of the master contract. Since plaintiff's pleadings and statements of counsel indicated

that the entire case was based on the theory that the local agreement which provided a procedure that permitted some low seniority workers to return to high-incentive jobs while denying the same right to plaintiff contravened the master plan, the defendants took the position that no material factual issues existed and that the court was required only to decide a question of law.

While it is true that the need for discovery was urged by plaintiff's counsel and noted by the court at an earlier hearing, neither at the end of the August 13th hearing when the court stated that he was taking the matter under advisement for decision nor at the November 1st hearing when he announced that he would proceed to treat the motion to dismiss as a motion for summary judgment and dispose of it – after obtaining from plaintiff's counsel on each occasion an acknowledgement that he had nothing further to offer – did plaintiff in any way object to the case being submitted for decision on the ground that he had been denied the right of discovery. Having assured the District Judge that he had nothing further to offer before the court took this case under advisement on a motion for summary judgment, plaintiff can not now say that summary judgment was improper because he had not pursued his discovery rights. *Cf. Helvering* v. *Wood*, 309 U.S. 344 (1940).

Although plaintiff was represented by counsel in the district court, he brought this appeal *in pro per*. At oral argument he was again represented, but by different counsel, and the court permitted arguments beyond the narrow question posed in plaintiff's brief. Aside from the discovery issue, this court has determined that the district court properly entered summary judgment on the record which was before it. Although the same factual situation underlies both law suits and plaintiff bases his charges of discrimination in both actions on the implementation of the local agreement which he claims was in contravention of the master contract, the two actions will be treated separately.

THE LABOR RELATIONS DISPUTE

Stripped of its verbiage, the complaint in the LMRA Section 301 action charges Ford with discrimination in employment practices and the Union with failure of its duty of fair representation of plaintiff's interests. An individual employee has standing to sue for enforcement of a collective bargaining agreement and may recover damages for breach of a union's duty of fair representation. *Smith* v. *Evening News Association*, 371 U.S. 195 (1962); *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The Supreme Court held in *Humphrey* v. *Moore*, 375 U.S. 335, 348 (1964), that in order to prevail in a claim for breach of duty of fair representation a plaintiff must produce "substantial evidence of fraud, deceitful action or dishonest conduct." In *Vaca* v. *Sipes, supra*, at 193 it was stated that the proof must show "arbitrary or bad-faith conduct on the part of the Union." The only language in the complaint which could conceivably be construed as charging bad faith is contained in two separate sentences as follows:

> The absence of standards [in the local agreement] permits favoritism and nepotism for friends and relatives, while punishing others neither favored nor related, said punishment made possible by the arbitrary selection of various employees for discriminatory treatment.
>
> and
>
> The effect of proceedings herein complained of by Plaintiff was discriminatory as directed against Plaintiff and others.

In its opinion, the district court held that the plaintiff had exhausted his grievance procedure to the extent required and that his complaint stated a claim for relief under Section 301 of LMRA. Turning then to "matters outside the pleading . . . presented to and not excluded by the court," Rule 12(b), Fed. R. Civ. P., the court made this finding: "It appears to be a certainty that plaintiff cannot meet the evidentiary standard

required for proof of unfair representation on grounds of nepotism." Having found that no genuine issue existed as to the only claim contained in the complaint the court then proceeded to determine whether the defendants were entitled to judgment as a matter of law. Rule 56(c), Fed R. Civ. P.

Upon examining Article VIII § 21 of the master agreement between Ford and the Union, the court found that this section did not cover the specific situation which resulted from the February shut down of the blast furnace. It was further held that the local agreement of which plaintiff complains was required to deal with this situation and that, as a matter of law, it did not violate Section 21. The court noted that seniority rights are not conferred by law, but only guarantee to an individual worker whatever priority the collective bargaining agreement provides. Since plaintiff had failed to indicate any provisions of the collective bargaining agreement establishing the rights that he claims were violated by the special local agreement, it was held that no issue was presented for trial. In the absence of a contrary provision in the master contract Ford and the Union were free to meet the situation caused by the shut down by local agreement. The Union's refusal to prosecute plaintiff's grievance was held not to have been based on bad faith or personal animus.

In *Balowski* v. *International Union, UAW and Local 735*, 372 F.2d 829 (1967), this court upheld summary judgment granted in favor of a union and an employer in a case alleging breach of the duty of fair representation. In the *Balowski* opinion, the court reviewed a number of cases dealing with the duty of fair representation and noted that a union must act "without hostile discrimination against any employee or group of employees," that it is allowed "[a] wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion" and that it is not required always to agree with an employee who presents a grievance. *Id.* at 833-34. Quoting from *Hardcastle* v. *Western Greyhound Lines*, 303 F.2d 182, 186-87 (9th Cir.), *cert. denied*,

371 U.S. 920 (1962), the court held that both the union and employer were entitled to summary judgment when "[t]he entire record before this court . . . does nothing more than establish that there is a difference of opinion . . ." concerning seniority. This language describes the true situation in this case. Other than mere conclusory statements contained in his two pleadings entitled "Brief and Answer," which have no probative value in summary judgment proceedings, see *Bsharah* v. *Eltra Corporation*, 394 F.2d 502 (6th Cir. 1968), the plaintiff presented nothing to the court except a disagreement between himself on the one hand and the Union and Ford on the other as to the application of Article VIII § 21 of the master contract to the situation which led to his change in work assignment. Assuming that all of the facts stated by plaintiff, as opposed to the unsupported allegations of discrimination, were true, the defendants were entitled to judgment as a matter of law.

THE CIVIL RIGHTS ACTION

In dealing with the civil rights action the district court made a number of holdings which have not been questioned on appeal, either in brief or oral argument. The court held that the complaint did not state a cause of action either under 42 U.S.C. § 1983 or the Fourteenth Amendment since it is not claimed that any of the acts of the defendants were performed under color of law or constituted state action. The court also held that plaintiff had no right to proceed in a class action under Rule 23. The court then proceeded to examine the action as one brought for relief against racial discrimination in employment under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, and held:

> Of course plaintiff may still maintain his individual claim if it is properly framed and supported by a modicum of evidence. After careful consideration I find that it is neither. The language of the complaint is vague, con-

> clusory, and thoroughly disingenuous. Plaintiff complains about the arrangements made for the shutdown, but does not explain how the facially neutral criteria employed there were *in esse* racially discriminatory. His broad allegations of discrimination are nothing more than bald and unilluminating conclusions of law. It seems that great care was exercised to avoid revealing who, other than plaintiff, was disadvantaged; what acts, if any, demonstrated racial discrimination; and how those acts justify that inference. The vague suggestions and innuendo of the complaint are wholly unacceptable.

The court went on to state that even if this complaint were not subject to dismissal for failure to state a claim, the defendants would be entitled to summary judgment because on the whole record the court found that plaintiff "lacks any evidence which would support a charge of racial discrimination." This complaint also charged breach of contract and duty of fair representation, which were similar to the claims in the LMRA action except that defendant's acts were claimed to have been based on racial discrimination, and the court found that these charges were totally without support.

Plaintiff places his principal reliance on *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), where the Supreme Court held that final responsibility for enforcement of Title VII is vested in the federal courts. The issue is that case was whether the plaintiff was foreclosed from seeking relief in a federal court pursuant to 42 U.S.C. § 2000e et seq. because of an adverse ruling in an arbitration proceeding involving the same complaint. The court held that the plaintiff in such a situation is not barred from proceeding in court and pointed out that even a finding by the Equal Employment Opportunity Commission of no reasonable cause to believe that the Act has been violated does not prevent a plaintiff from pursuing his remedy in court. Nowhere in *Gardner-Denver* did the Court hold or intimate that after an action for discrimination in employment is brought in a federal court the court may not dis-

pose of the action by summary judgment if such proceedings are otherwise justified by the record. In *Marlowe* v. *Fisher Body*, 489 F.2d 1057, 1066 (1973), this court reiterated its approval of the following language from *Scher* v. *Board of Education of West Orange*, 424 F.2d 741, 744 (3rd Cir. 1970):

> A case brought under the Civil Rights Act should not be dismissed at the pleading stage unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.

The Civil rights complaint in this case contains the following language:

> *(Proceeding)*
>
> 7. This is a proceeding for a declaratory judgment as to Plaintiffs rights and also for preliminary and permanent injunctions restraining Defendants from maintaining a policy, practice, custom or usage of:
>
> (a) Discriminating against Plaintiff and other employees because of race or color and without respect to compensation terms, conditions, seniority, job status, and privileges of employment, said Plaintiff and other employees constituting a class composed almost entirely of Negro persons.
>
> (b) Limiting, transferring, segregating, and classifying employees of the Ford Motor Company who are members of International Union, UAW, a union organization, and Local 600, UAW, a union organization in ways which deprive Plaintiff, Negroes and other persons in his class of equal employment opportunities and otherwise affect their status as employees because of race or color.

(Facts)

8. All matters regarding hiring, terms, conditions and privileges of employment of Plaintiff and the class he represents have been at all times material to this action, governed by collective bargaining agreements entered into between Defendant Union and Defendant Company.

9. In spite of the terms of the aforementioned agreements, the Defendants have jointly and knowingly established a hiring, promotional and seniority system, the design, intent and purpose of which is to continue and preserve, and which has and continues to have the effect of continuing and preserving the Defendants policy, practice, custom, and usage of limiting the employees for employment opportunities, including but not limited to:

(a) The denial of equal opportunity to Plaintiff, Negro employees and others for reinstatement, and/or transfer on the same and as favorable a basis as white employees.

(b) The failure of Defendant International Union, UAW, a union organization, and Local 600, UAW, a union organization, to fairly represent Plaintiff, Negro employees and others on grievances and in collective bargaining.

• • •

Standing alone, the quoted language would state a claim for relief. However, the remainder of the complaint is a recitation of plaintiff's charge that Ford and the Union, by the special local agreement and its implementation, violated the master contract. The only difference between the remainder of the complaint and the complaint in the Section 301 action is the addition of the allegation that the actions of the defendants "unreasonably, unfairly and calculatedly jeopardize the jobs of all members of the class and tend to deprive Plaintiff, Negro

employees and others from employment of equal opportunities and otherwise adversely affect their status or prospective status as employees."

The coupling of the words "Plaintiff, Negro employees and others" seems designed solely to imply that racially discriminatory practices were involved in the methods selected by Ford and the Union to deal with the cut back required by the closing of the blast furnace in the rolling mill unit. When viewed in light of the admitted fact that plaintiff is himself a Causacian and that no Negro employee joined in any of his numerous complaints about the handling of the February 22nd shut down or in either of the actions in the district court and by the further fact that no Negro alleged to have been discriminated against by these actions is identified either in the pleadings or in the other papers filed by plaintiff, the court was justified in concluding that "Plaintiff's pleadings are evasive for the simple reason that he lacks any evidence which would support a charge of racial discrimination."

Although the argument was never made in the district court, on appeal the plaintiff maintains that is was impossible for him to produce evidence of discrimination without discovery because all of the facts were in the possession of the defendants. We have previously noted that on at least two occasions prior to taking the case under submission for disposition under Rule 56, the court inquired of counsel for the plaintiff if he had anything further to offer and received a negative response. If the reasons which plaintiff now urges for his failure to produce evidence of discrimination were valid, he could have protected himself from an unwarranted entry of summary judgment by invoking Rule 56(f), Fed. R. Civ.P., which reads as follows:

> (f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance

to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The district court correctly determined that there were no genuine issues as to any material fact in either case and that the defendants were entitled to judgment as a matter of law.

The judgment of the district court is affirmed. No costs are taxed. Each party will bear its own costs on this appeal.

MEMORANDUM OPINION

United States District Court
Eastern District of Michigan
Southern Division

(Filed .....)

Boris Thomas,

Plaintiff,

vs

Ford Motor Company, a Delaware corporation and International Union, UAW, a union organization, and Local 600, UAW, a union organization

Defendants.

Civil Actions Nos. 39879 and 40129

Plaintiff sues Ford Motor Company, the International Union-UAW, and Local 600-UAW, alleging racial discrimination, unfair representation, and violation of the col-

lective bargaining agreement. Defendants move to dismiss, or in the alternative to strike certain demands in the complaint. Inasmuch as it has been necessary to go beyond the pleadings, the motion has been treated as one for summary judgment pursuant to Rule 56.[1]

Background

The relevant events are essentially undisputed. In the spring of 1971 a blast furnace in the slab mill of the rolling mill in which plaintiff worked as an electrician was closed down for repairs. In preparation for the shutdown, officials of Ford and Local 600 met in late 1970 to make arrangements for layoffs and bumping rights. The resulting agreement, dated December 21, 1970, and two supplementary letters of understanding, dated February 16 and March 4, 1970, provided that approximately sixteen low seniority electricians in the rolling mill were to be temporarily laid off. Those with higher seniority were to exercise their seniority within the rolling mill so as to remain on the job during the shutdown. Plaintiff was one of this latter group and was required to accept a lower incentive job assignment at the same time that the low seniority electricians were laid off. Once full operations

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[1] "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ." Fed.R.Civ.P. 12(b).

Both sides have submitted a variety of documents, all of which have been read and considered for purposes, of their motion, and both have been timely apprised of this court's intention to treat the motion as one for summary judgment. In addition, the union's motion to dismiss specifically requests the court to treat this as a motion for summary judgment should it become necessary to consider matters outside the pleadings.

were resumed, plaintiff found himself with insufficient seniority to bid back to his former high incentive position. The low seniority electricians, however, because they had been on layoff status, were permitted to resume work in their former high incentive jobs.

As was noted by the International Union's Public Review Board, in the course of considering plaintiff's appeal from the union's failure to prosecute his grievance, plaintiff "has displayed unusual energy and resourcefulness in attempting to right the wrong he believes he has suffered. He has written to Ralph Nader, filed charges with the NLRB,[2] appealed from the dismissal of those charges, complained to the Department of Labor and to the EEOC."[3] Except for having obtained a "right to sue" letter from the EEOC, he has been wholly unsuccessful in these efforts.

Current Litigation

Having failed to obtain relief in any other forum, plaintiff instituted an action in this court (docket no. 39879) charging defendants with violating the terms of the Ford-UAW collective bargaining agreement. He later filed a second suit (no. 40129) alleging racial discrimination and breach of the duty of fair representation. All charges related to the events surrounding the furnace shutdown. The two actions were subsequently consolidated and have, for all practical purposes, been treated as a single case.

---

[2] In cases No. 7-CA-8722 and 7-CB-2404 the Regional Director refused to issue a complaint, and this decision was affirmed on appeal to the General Counsel. Two requests for reconsideration were subsequently denied. A complaint was not issued in case No. 7-CB-2420, but that decision was never appealed.

[3] On March 2, 1973, plaintiff was issued a "right to sue" letter by the EEOC in cases No. TDT2-0049, TDT2-0050, and TDT2-0471. No other relief was granted.

The defendants' motions and this opinion are directed at all three of plaintiff's claims for relief. Singular references, particularly those made to "the complaint," should be read accordingly. Likewise, although the International Union and Local 600 were individually named as defendants, their interests and the bases for their liability are virtually identical. They have, therefore, been considered as essentially a single entity, referred to simply as "the union".

Plaintiff advances three distinct theories of liability. He sues the company for breach of contract, claiming that the procedure whereby he was forced to continue working rather than being allowed to take a layoff was a violation of the collective bargaining agreement (Count I). He alleges a concomitant breach by the union of its duty of fair representation because of its participation in that arrangement, and (perhaps) because of its failure to prosecute plaintiff's grievance (Count II). Finally, plaintiff charges that the defendants conspired to discriminate against plaintiff and others in the company's hiring, promotional, and seniority systems in violaiion of Title VII of the 1964 Civil Rights Act,[4] 42 U.S.C. §§ 1981 and 1983, and the fourteenth amendment (Count III).

Counts I and II

Although never specifically cited by plaintiff, it appears that the charges of breach of contract and unfair representation are brought under 29 U.S.C. § 185 (Section 301 of the Labor Management Relations Act of 1947). Defendants question plaintiff's right to sue under Section 301 on a variety of grounds.

[4] 42 U.S.C. §§ 2000e to 2000e-15.

1. *Plaintiff's Right to Sue Under Section 301.*

a. *Effect of NLRB Jurisdiction*—It is well established that actions under Section 301 are maintainable even where the subject matter would also be within the Board's jurisdiction over unfair labor practices. *Smith v. Evening News Ass'n.*, 372 U.S. 195, 197 (1962); *Vaca v. Sipes*, 386 U.S. 171, 176-83 (1967). It follows that the exhaustion of remedies available from the NLRB is not a prerequisite to maintenance of this action. *See West Coast Tel. Co. v. Local 77, IBEW*, 431 F. 2d 1219, 1222 (9th Cir. 1970). Conversely, neither does an unsuccessful exhaustion of those remedies necessarily bar relief under Section 301. The legal rights and liabilities at issue in a Section 301 suit are distinct from those involved in proceedings before the NLRB. Each represents a different cause of action, and a decision in one type of suit cannot constitute *res judicata* as to the other. An unfair labor practice may or may not be a contract or fair representation violation, and vice-versa. It is true that the doctrine of collateral estoppel might operate to foreclose further consideration of certain issues of fact (or of fact and law) once decided, regardless of the type of action of fact and law) once decided, regardless of the type of action involved. The conclusion of a regional director and the general counsel of the NLRB that a complaint should not issue is not, however, an adjudication of the sort which can give rise to such an estoppel. *Ruzicka v. General Motors Corp.*, 366 F. Supp. 824, 827 (E.D. Mich. 1972).

b. *Individual Employee's Right to Sue*—Individual employees may bring suit to vindicate rights conferred upon them by the collective bargaining agreement, *Smith v. Evening News Ass'n, supra*, 371 U.S. at 198-200, and for

violations of the union's statutory duty of fair representation. *Vaca v. Sipes, supra; Amalgamated Ass'n. of St., Elec. Ry. & Motor Coach Employees v. Lockridge,* 403 U.S. 274, 299 (1971).

c. *Exhaustion of Contractual Remedies*—As a general rule, "individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652 (1965) (emphasis in original, footnote omitted). Such efforts are not required, however, if the parties did not intend the grievances and arbitration procedure to be the exclusive remedy under the contract,[5] or if the pursuit of such a remedy would be a futile act.[6]

Plaintiff's allegation in the complaint that he has exhausted his contractual remedies stands uncontradicted on this record. Plaintiff filed his own grievance after he was unable to persuade the union to do so on his behalf. That grievance was denied at the first stage, and the union refused to carry it any further. Plaintiff pursued his intra-union remedies in an attempt to reverse this decision, but was unsuccessful.

Article VII, Section 1 of the Ford-UAW collective bargaining agreement provides in part as follows:

> "Except with respect to the right to present an individual grievance as expressly set forth in Section

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[5] *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 657-58 (1965).

[6] "An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. . . . In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action." *Vaca v. Sipes,* 386 U.S. 171, 185 1967).

> 2 of this Article, the Union shall, in the redress of alleged violations by the Company of this Agreement or any local or other agreement supplementary hereto, be the exclusive representative of the interests of each employe or group of employes covered by this Agreement, and only the Union shall have the right to assert and press against the Company any claim, proceeding or action asserting a violation of this Agreement."

The right of an individual to present his own grievance provided for in Section 2 is limited to its initial submission to the foreman (first stage). After disallowance by the foreman, it may be prosecuted further only with union cooperation. That cooperation was denied plaintiff by his committeeman, the Grievance Committee of the Local 600 General Council, the Local Executive Board, the General Council, the International Executive Board Appeals Committee, and the International Union's Public Review Board. Plaintiff's efforts to bring this case before the UAW Convention Appeals Committee were unsuccessful.

> "[A]nother situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance."

Vaca v. Sipes, 386 U. S. 171, 185 (1967) (emphasis in original). Plaintiff meets this standard and is entitled to sue under Section 301.[1]

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[1] *See, e.g., Williams v. Dana Corp.*, 442 F.2d 412 (6th Cir. 1971), in which the court held that a member of the UAW who alleged that the union had failed to press his grievance was not barred from suing under Section 301 by failure to exhaust his contractual remedies.

This conclusion is confirmed by another paragraph of Article VII, Section 1:

> "Any grievance that either (a) is not processed or (b) is disposed of in accordance with this Grievance Procedure shall be considered settled, and such settlement shall be final and binding upon the Company, the employe or employes involved, the Union and its members."

2. *Substance of Plaintiff's Claims Under Section 301.*

a. *Union's Breach of the Duty of Fair Representation*— Although plaintiff is properly in court, there are serious doubts as to the viability of his claims under Section 301.

> "It is now well established that, as the exclusive bargaining representative of the employees in [a particular] bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement . . . Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

The employee's right to fair representation does not, however, include an absolute right to have his grievance taken to arbitration, even if it is ultimately shown to be meritorious.[8] If the union's conduct is not improperly mo-

[8] *Vaca v. Sipes*, 386 U.S. 171, 191-95 (1967).

tivated and is within the bounds of rationality, the fact that it may "unfairly" work a hardship on one employee is not enough to require condemnation.[9] The duty of fair representation is breached only when the union's conduct is "arbitrary, discriminatory, or in bad faith."[10] There must be "substantial evidence of fraud, deceitful action or dishonest conduct,[11] or of "discrimination that is intentional, severe, and unrelated to legitimate union objectives.[12] To insure that the salutary purposes of the pre-emption doctrine are not subverted by excluding unfair representation suits from its purview, the distinction "between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained.[13]

The complaint charges that the union has acted "discriminatorily and arbitrarily" in adhering to "the unlawful and discriminatory practices and policies complained of herein." The rest of the complaint is not, however, very illuminating as to just what are the "practices and policies complained of", nor as to how they are *impermissibly* discriminatory. There is an explicit allegation of racial discrimination, but its viability is dependent on that of Count III.

The only other possibilities are personal animosity and nepotism. Although it appears that plaintiff did not get along well with certain local officials, this hardly accounts for the consistent rejection of his appeals at all levels of

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[9] *Id.*

[10] *Id.* at 190.

[11] Humphrey v. Moore, 375 U.S. 335, 348 (1964).

[12] *Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971).

[13] *Id.*

the union and by the Public Review Board (which has exclusively non-union members). In any event, personal frictions are not mentioned in the complaint, and this court is reluctant to imply them as a basis of plaintiff's case without more of a foundation than its own speculation.

Plaintiff has in the past been somewhat more explicit about the possibility that relatives of local officials received favored treatment by virtue of their membership in the group that was laid off. He does allege in the complaint that all sixteen of the employees placed on temporary layoff status were related to company and union officials, though he had previously been able to name only two who were so related. He has never been able to produce even a shred of evidence of any intent to discriminate in their favor, however, and his claim has been consistently rejected. It appears to a certainty that plaintiff cannot meet the evidentiary standard required for proof of unfair representation on grounds of nepotism. This count must therefore stand or fall upon his claims of racial discrimination.

b. *Violation by the Company of the Collective Bargaining Agreement*—Plaintiff alleges that the agreements of December 21, 1970, and of February 16 and March 4, 1971, and the procedures implemented pursuant thereto violated three provisions of the collective bargaining agreement: Article X, Section 9; Article X, Section 12; and Article VIII, Section 21. The first of these prohibits, *inter alia*, racially discriminatory application of the contract. Like the charges of unfair representation, this is dependent upon the viability of plaintiff's allegations of discrimination under Count III. The second provision merely states that the parties may not, in the guise of clarifying the language of the document, alter its sub-

stance. It is Article VIII, Section 21,[14] dealing with the right to deviate from seniority in the event of a temporary layoff, which is the heart of Count II. I find, as a matter of law, that there was no violation of this section, and thus no cause of action thereunder.

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[14]Section 21. Temporary Layoffs

(a) A temporary layoff, on model changes only, is defined as a layoff of not more than thirty (30) working days.

A temporary layoff for any other reason, is defined as a layoff of not more than twelve (12) working days

The provisions covering temporary layoffs shall apply to all employes, both production and non-production employes, and the so-called "skilled plant-wide" classifications in the Rouge Area. The so-called "skilled plant-wide" classifications are not subject to the model change layoff provisions of this Agreement.

(b) Right to Deviate from Seniority

In the event of a temporary layoff, the Company shall have the right to lay off employes as their work is completed, irrespective of their group seniority; provided, however, that no other employe will be used on the jobs of employes who are temporarily laid off.

Upon resumption of work, employes shall be recalled as their jobs open up.

If necessary to retain some employes as members of a skeleton crew in a department during a temporary layoff, seniority employes will be used when practical.

(c) Discussions After 5 Days

After five (5) days elapsed following a temporary layoff, the Union shall meet with the Company to discuss the practicability of recalling seniority employes to replace junior employes for the remainder of such temporary layoff period; and where the Company agrees that it is practicable to do so, it will make such replacements.

(d) Local Negotiations

Deviation from the terms of this Section may be made by agreement betyeen local Management and the Unit affected for a particular temporary layoff. Any other agreement to deviate from this Section shall be subject to written approval of the National Ford Department of the Union and the Labor Relations Staff of the Company.

(e) Limitation on Use

The temporary layoff provisions shall not be used for the purpose of avoiding seniority adjustments by scheduling a series of temporary layoffs to meet planned production nods.

Section 21 is applicable exclusively to "deviations from seniority" within the meaning of subsection (b) which occur during a "temporary layoff" within the meaning of subsection (a). It is only in those limited circumstances that the parties are required to follow the procedures outlined in Section 21. The arrangements of which plaintiff complains meet neither of the preconditions.

Subsection (a) defines a temporary layoff, for reasons other than model changes, as one not exceeding twelve working days. Plaintiff argues that because the reduction in force and layoffs in the slab mill lasted more than two months, local company and union officials were without power under Section 21 to approve of the arrangements actually made. The argument is technically correct, but proves merely that the section is irrelevant as applied to the events in question. It does not provide for any contingency other than "temporary layoffs," and by its terms therefore cannot operate as a restriction of any sort upon a layoff which because of its length was not "temporary".

Furthermore, it appears that there was no deviation from seniority such as is contemplated by Section 21. Subsection (b) states that "[I]n the event of a temporary layoff" the company may lay off employees as their work is completed, irrespective of their group seniority. However, there is absolutely no indication here that the layoffs were made according to work completed rather than by seniority. Indeed, plaintiff admits that the sixteen employees laid off were those with the lowest seniority, and that those who continued to work were those with highest seniority. It may be that under certain circumstances a higher seniority employee might have the right to chose a layoff in preference to a job transfer,[15] but no such cir-

[15] *See, e.g.*, Article VIII. Section 16(b) of the Ford-UAW collective bargaining agreement, providing that an employee with ten years seniority who exhausts his seniority within the Unit may elect to take either available work or a layoff.

cumstances are pleaded or argued by any party to this lawsuit, and will not be implied *sua sponte*.

Plaintiff seems not to realize that seniority *per se* confers no rights whatsoever on the employee. Higher seniority entitles him to priority in work related matters only to the extent that the collective bargaining agreement (or a statute) so provides.[18] It follows that there can be a "deviation" from seniority only when there is a derogation of privileges specifically accorded the worker in the collective bargaining agreement. The process of defining the scope of seniority rights under the contract merely delineates what may or may not be deviated from. In this the parties generally possess wide discretion.

> "Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-39 (1953).

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[18] *See, e.g., Trailmobile Co. v. Whirls*, 331 U.S. 40, 53 n.21 (1947), *Cedarland v. Norge Div., Borg-Warner Corp.*, 407 F.2d 1062, 1064-65 (6th Cir. 1969); *cert. denied*, 395 U.S. 927; *Local 125I, UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968); *Cortez v. Ford Motor Co.*, 349 Mich. 108, 112 (1957).

Of course, once certain rights are established in a currently operative collective bargaining agreement, the parties may not, by supplementary agreements or otherwise, deny them to the individual worker-beneficiaries in contravention of that agreement.[17] Plaintiff does not cite any section of the Ford-UAW agreement which would give him the right to be laid off in the circumstances involved in the furnace shutdown. And from the fact that the company and the union felt it necessary to negotiate a special agreement covering the shutdown, it may be inferred that the collective bargaining agreement did not provide for such situations. Thus the agreement must properly be considered a definition of seniority rights (about which plaintiff cannot complain) rather than a deviation from previously vested rights.

Count III—Racial Discrimination

There is no cause of action stated here under 42 U.S.C. §1983. As an essential element of his claim for relief, plaintiff must allege that he was deprived of a constitutional right "under color of any statute, ordinance, regulation, custom, or usage of any State of Territory."[18] Similarly, no suit can be maintained under the fourteenth amend-

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[17] *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453-54 (1957).

[18] 42 U.S.C. § 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

ment without an allegation of state action.[19] There is no such allegation in the complaint, and even if there were it would not raise a genuine issue of fact.

Although a few courts have expressed the opinion that 42 U.S.C. §1981 is also limited to acts engaged in under color of state law,[20] that position is no longer tenable in view of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).[21] The applicability of Section 1981 to private acts of discrimination has been explicitly recognized since that case in at least five of the circuits.[22] A similar fate has befallen the argument that Title VII of the 1964 Civil

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[19] "Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Shelley v. Kraemer, 334 U.S. 1, 13 1948) (footnote omitted).

[20] *See, e.g., Smith v. North American Rockwell Corp.*, 50 F.R.D. 515, 518 (N.D. Okla. 1970); *Colbert v. H-K Corp.*, 295 F.Supp. 1091, 1093 (N.D. Ga. 1968); *Waters v. Paschen Contractors, Inc.*, 227 F.Supp. 659, 660 (N.D. Ill. 1964); *Blocker v. Board of Education of Manhasset, New York*, 226 F.Supp. 208, 227 (E.D.N.Y. 1964).

[21] In *Jones* the court held that 42 U.S.C. § 1982 applied to private as well as state action. The decision was based upon a construction of the Civil Rights Act of 1866, in which both Section 1981 and Section 1982 were enacted as parts of the same Section (Section 1) of the Act (Act of April 9, 1866, c.31, § 1, 14 Stat. 27). It is instructive to note that the court distinguished 42 U.S.C. § 1983 (which was enacted as Section 2 of the Act) based on its specific references to state action, references wholly absent from Section 1982. The wording of Section 1981 closely approximates that of Section 1982.

[22] *See Waters v. Wisconsin Steel Workers of International Harvester Co.*, 427 F.2d 476, 481-85 (7th Cir. 1970), *cert. denied*, 400 U.S. 911; *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757, 758-60 (3d Cir. 1971); *Scott v. Young*, 421 F.2d 143, 145 (4th Cir. 1970), *cert. denied*, 398 U.S. 929; *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621, 622-23 (8th Cir. 1972); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097, 1099-1100 (5th Cir. 1970), *cert. denied*, 401 U.S. 948.

Rights Act was intended to "preempt" Section 1981 as the exclusive remedy for discriminatory conduct.[23]

A more serious problem is posed for the plaintiff under both Title VII and Section 1981 by the fact that he complains of discrimination directed against blacks, but is himself white. It is conceivable that a white person might be incidentally injured by such discrimination. If he were a "person claiming to be aggrieved,"[24] or if he were denied

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[23] *Compare Smith v. North American Rockwell Corp.*, 50 F.R.D. 515, 518 (N.D. Okla. 1970); *with Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621, 622-24 (8th Cir. 1972).

[24] 42 U.S.C. §§ 2000e-2(a) and (c) make it an unlawful employment practice for either an employer or a union to discriminate in any facet of the employment relationship on the basis of race. According to Section 2000e-5(b) and (f)(1) of Title VII, a complaint alleging an unfair labor practice may be filed with the EEOC, and later in federal court, by "a person claiming to be aggrieved." The statute nowhere requires the aggrieved party to have been the object of the conduct complained of, only that he claim to have been injured thereby. *Cf. Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969); *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442, 445 (3d Cir. 1971); *Wilson v. Sibley Memorial Hospital*, 340 F.Supp. 686, 687 (D.D.C. 1972).

Although the requirement of standing serves to limit the sort of grievance which would be judicially cognizable, an "incidental" injury satisfies that requirement as well as the statutory language. "The use in 42 U.S.C. § 2000e-5 of the language 'a person claiming to be aggrieved' shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442, 446 (3d Cir. 1971). As to the elements of standing, *see Sierra Club v. Morton*, 405 U.S. 727 (1972); *Data Processing Service v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

the same rights as other "white citizens,"[25] as a result of racially motivated, proscribed conduct, he would have stated a cause of action under either statute.

It does not follow, however, that a white plaintiff is qualified under Rule 23(a)[26] to bring a class action in behalf of the blacks he claims were discriminated against. Plaintiff's deliberately vague pleadings make it highly uncertain just how large the class subjected to the claimed discrimination really is. If it consists only of a few electricians in the rolling mill,[27] it is not sufficiently large to

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[25] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981.

An even more extreme position than is adopted here has been taken in several cases where the statute was held applicable to discrimination *directed against* whites. *See Carter v. Gallagher*, 452 F.2d 315, 325 (8th Cir. 1971); *Gannon v. Action*, 303 F.Supp. 1240, 1244 (E.D. Mo. 1969); *aff'd in part and rev'd in part on other grounds*, 450 F.2d 1227 8th Cir. 1971); *Central Presbysterian Church v. Black Liberation Front*, 303 F.Supp. 894, 899 (E.D. Mo. 1969); *Kentucky v. Powers*, 139 F. 452 (Cir. Ct. E.D. Ky. 1905), *rev'd on other grounds*, 201 U.S. 1.

[26] "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R.Civ.P. 23(a).

[27] In a letter to Leonard Woodcock dated July 29, 1971, plaintiff charges that "the entire agreement initiated by the Company and executed by Nick Nestico discriminates against five brother members of the Union. . . ."

make joinder impractical. If the class is any larger than this,[28] there is serious doubt as to whether there remain any questions of law or fact common to all of them. Certainly plaintiff's claims would not be typical of the claims which might be raised by a larger class, particularly one which is by his own admission almost entirely black, and is the primary rather than incidental target of discrimination. This last factor also indicates the unlikelihood that he would be able to fairly and adequately protect the interests of such a broad class.

Of course plaintiff may still maintain his individual claim if it is properly framed and supported by a modicum of evidence. After careful consideration I find that it is neither. The language of the complaint is vague, conlusory, and thoroughly disingenuous. Plaintiff complains about the arrangements made for the shutdown, but does not explain how the facially neutral criteria employed

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[28] According to the complaint:

"[T]he class which Plaintiff represents is composed of Negroes and others who have been employed, are employed or might be employed by Ford Motor Company, at its Rouge Plant Steel Division in Dearborn, Michigan, and who were, are or might become members of International Union, UAW, a union organization, and Local 600, UAW, a union organization, who have been and continue to be or might be adversely affected by the practices complained of herein."

Among the practices complained of are:

"Discrimination against Plaintiff and other employees because of race or color and without respect to compensation terms, conditions, seniority, job status, and privileges of employment, said Plaintiff and other employees constituting a class composed almost entirely of Negro persons;" and

"Limiting, transferring, segregating, and classifying employees of the Ford Motor Company who are members of International Union, UAW, a union organization, and Local 600, UAW, a union organization in ways which deprive Plaintiff, Negroes and other persons in his class of equal employment opportunities and otherwise affect their status as employees because of race or color."

there were *in esse* racially discriminatory. His broad allegations of discrimination are nothing more than bald and unilluminating conclusions of law. It seems that great care was exercised to avoid revealing who, other than plaintiff was disadvantaged; what acts, if any, demonstrated racial discrimination; and how those acts justify that inference. The vague suggestions and innuendo of the compiaint are wholly unacceptable.

Furthermore, even if Count III were not on its face subject to dismissal, defendants would be entitled to a summary judgment. Plaintiff's pleadings are evasive for the simple reason that he lacks any evidence which would support a charge of racial discrimination. He feels aggrieved and has seized on every conceivable basis in law for asserting his grievance, regardless of actual merit. The passionate and persistent assertion of a claim will not atone for its total lack of a factual foundation.

Falling with Count III are the remaining contract and fair representation claims which were also bottomed on the charges of racial discrimination. The remainder of defendants' arguments need not be considered. A summary judgment on all counts shall be entered in favor of defendants.

An appropriate order may be presented.

/s/ John Feikens
United States District Judge.

Dated: Detroit, Michigan, November 7, 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1251

BORIS THOMAS,
Petitioner,
v.
FORD MOTOR COMPANY, a Delaware Corporation, and INTERNATIONAL UNION, UAW, a labor organization, and LOCAL 600, UAW, a labor organization,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT UNIONS IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

When the District Court had plaintiff's evidence before it, and when defendants had submitted an Affidavit and other material, was it proper for the Court of Appeals to affirm the District Court's Order granting defendants' motions for summary judgment pursuant to Rule 56, FRCP?

STATEMENT OF THE CASE

Petitioner's[1] statement omits relevant facts and proceedings and includes certain erroneous facts and legal conclusions.

The correct facts and proceedings are generally as stated by the District Court (A .15-.18, .24-.26, .30)[2] and by the Court of Appeals (A .1-.6, .8, .11-.14). The Unions shall emphasize certain facts and proceedings which were omitted or misstated by Petitioner.

Plaintiff, by his counsel, in Civil Action No. 39879, sued Ford for breach of collective bargaining agreement and sued the Unions for alleged unfair representation (A 1.7, .18). Subsequently, in Civil Action No. 40129, plaintiff sued said defendants for alleged civil rights violations and for the Union's alleged breach of duty of fair representation (A .18, .23).

Petitioner is white (A .13, .30). He complained about discrimination against black employees (*Ibid*).

Plaintiff, by his counsel, admitted in District Court that the crux of both of his Complaints was that said local Agreements violated the Ford-UAW Master Agreement. The lower Court also concluded that the alleged Contract violation was the basis of *both* complaints (A .13).

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[1] Petitioner will hereinafter usually be referred to as "Thomas" or as "plaintiff." Respondent International Union, UAW, will usually be referred to as the "International" or the "UAW;" Respondent Local 600 will usually be referred to as "Local 600" or as the "Local." Said Respondents may be referred to jointly as the "Union" or "Unions." Respondent Ford Motor Company will hereinafter usually be referred to as "Ford" or the "Company."

[2] Citations to Petitioner's Appendix will be in parenthesis, as "(A .—)." Citations to Respondent Union's Appendix will be in parenthesis, as "(B .—)."

Ford filed Answers and Affirmative Defenses, which attached the December 7, 1970 Master Agreement (A .3; A.); later Ford filed its Motion to Dismiss (A .3; A .16).

The Unions filed Motions to Dismiss and Briefs (A .3; .16). The Union's Motion was partly based upon an Affidavit and attachments (A .3, .16).

After the Union's Motion was filed, plaintiff's attorney filed a notice of taking the deposition of persons, including Local Union members (A .14). Counsel for plaintiff and the Unions agreed that the depositions would not be taken and that any "discovery would wait until the judge rules on our motions to dismiss the above cases." (A .4, .5).

Plaintiff, by his attorney, filed Briefs and Answers to defendants' Motions (A .3). Neither plaintiff nor his attorney filed any affidavit or other sworn material in response to the Union's Affidavit and material (A .3). Plaintiff's Answers almost entirely were legal conclusions denying defendants' defenses.

On June 25, 1973, there was a hearing on said Motions before District Judge Feikens. During the argument, plaintiff's counsel informally urged that his complaint stated a cause of action and suggested that discovery would be appropriate (A .5). After argument by counsel for all parties, the matter was adjourned so plaintiff's lawyer could examine records supporting Ford's defenses (A .5).

A subsequent District Court hearing was held on August 13, 1973 (A .4; B .3-.5). Plaintiff's counsel began that hearing by stating that he had nothing further to present to the Court on the Title VII action (B .4).

On November 1, 1973, Disrict Judge Feikens held a recorded conference in his Chambers (A .14). The Judge advised counsel for all parties that he intended to treat

defendants' Motions to Dismiss as Motions for Summary Judgment, pursuant to Rule 56, FRCP (A .4; B .6). The Judge asked counsel for all parties if they had any additional material to submit, prior to the Judge's ruling upon the Motions (A .4; B .5). Plaintiff's lawyer twice stated that plaintiff had "nothing else" to submit to the Court (A .4; B .5, .6). He did not request discovery or ask that the Court not yet decide the case (A .6).

On November 7, 1973, the District Judge issued his Memorandum Opinion granting defendants' Motions on some of the grounds raised (A .15-.33).

Plaintiff appealed to the Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the District Court's grant of defendants' Motions for Summary Judgment.

Essentially, here, as in the Court of Appeals, plaintiff asserts that the District Judge erred by granting summary judgment for defendants, allegedly without allowing plaintiff an opportunity to get and submit evidence and without a trial.

ARGUMENT

THE DECISION BELOW IS CORRECT; IT IS IN ACCORD WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER COURTS OF APPEALS; AND THE DECISION BELOW PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT.

The lower Courts' opinions were correct and were consistent with the Federal Rules and with decisions of this Court and of other Courts of Appeals.

No important Federal civil rights or labor question is presented by this Petition.

In order to invoke this Court's jurisdiction, Petitioner argues that the lower court decisions conflict with this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Petitioner contends that *Gardner-Denver* requires a Federal Court trial in civil rights cases and precludes summary judgment in such cases.

Petitioner is wrong. *Gardner-Denver* does not support Petitioner's views. The decisions below do not conflict with *Gardner-Denver*. This Court held, in *Gardner-Denver*, that a contract arbitration award does not bar a Federal Court's consideration of claims under Title VII of the 1964 Civil Rights Act. Plaintiff here had such consideration by the District Court.

The District Court, though referring to a decision by the independent Public Review Board[3] and other material, clearly did not feel bound by any prior decision (A .19, .20-.33). Nor did the District Court merely judicially review any prior decisions. It is clear that the District Court directly considered all of the pleadings, the Affidavit and all other materials which the parties presented and desired to present. Judge Feikens' lengthy opinion shows how carefully he considered the case for himself, and concluded for himself that there was not sufficient evidence on which to base a claim of racial discrimination (A .28-.33). This met the *Gardner-Denver* requirement of *de novo* consideration (415 U.S. at 60).

Contrary to Petitioner's argument, *Gardner-Denver* did not nullify the use of summary judgments under Rule 56, FRCP.

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[3] The Public Review Board decision was admitted into evidence, when it was attached to the Unions' Affidavit (A .3; .17). In *Gardner-Denver, supra*, this Court expressly stated that even an arbitration decision may be admitted into evidence and accorded such weight as is appropriate (415 U.S. at 60).

In other post-*Gardner-Denver* civil rights cases, Courts of Appeals have affirmed dismissal of complaints without a trial.[4] Petitioner has cited no Court of Appeals decision which might conflict with the decisions of the lower Courts.

While Petitioner does not show how it justifies this Court's consideration, he argues that the lower Court granted summary judgment without affording Petitioner an "opportunity to adduce proofs."[5] The record does not support Petitioner in that regard.

Plaintiff's lawyer agreed with the undersigned counsel that there should be no discovery until after the Judge ruled on defendants' motions (A .4, .5). This was done because, if the motions were granted, discovery would have been a waste of time.

Furthermore, District Judge Feikens was extraordinarily careful to give plaintiff and his lawyer every opportunity to submit more material.

The first hearing on defendants' motions was adjourned so plaintiff's lawyer could verify the information relied upon by Ford and to give plaintiff's lawyer an opportunity to present additional evidence or argument (B .4). Ford's counsel gave plaintiff's counsel additional material (A .5).

At the second hearing, plaintiff's counsel stated: "At this time, I have nothing additional to present to the Court on the Title VII action . . ." (B .4).

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[4] See, for example, *Bellamy v. Mason's Stores, Inc.*, 508 F. 2d 504, 505 (4th Cir. 1974); *Baker v. California Land Title Co.*, 507 F. 2d 895 (9th Cir. 1974); *Guerra v. Manchester Terminal Corp.*, 498 F. 2d 641, 646, 647 (5th Cir. 1974); *Patmon v. Van Dorn Co.*, 498 F. 2d 544, 545 (6th Cir. 1974); and *Williams v. General Foods Corp.*, 492 F. 2d 399, 405 (7th Cir. 1974), affirming dismissal as to Union defendants.

[5] This issue was raised for the first time on appeal to the Court of Appeals. For that reason alone, it should not be considered by this Court.

The District Judge, prior to the close of the second hearing asked plaintiff's counsel if plaintiff was satisfied with his responses to defendants' motions. Plaintiff's counsel replied that the answers which he filed were sufficient along with the exhibits in the case (A .6; B .4).

At a conference in Chambers, on November 1, 1973, plaintiff's counsel was advised that the Judge would treat defendants' motions to dismiss as for summary judgment, and plaintiff's counsel was again asked if he had further material to submit (A .6; B .5). Plaintiff's counsel twice indicated that "We have nothing else . . ." (B .5, .6).

Certainly, the record does not demonstrate unfairness to plaintiff nor an issue of sufficient importance to justify this Court's considering procedural arguments, which were rejected by the Court of Appeals (A .3-.6, .10, .13, .14).

Though Petitioner refers to himself as a representative of a class in his Statement of the Case, he did not appeal from the District Court's dismissal of the class action part of his complaint (A .9, .31, .32); and he does not here assert that dismissal as a reason for granting his Petition.

Petitioner does not contend that the substantive issues justify this Court's considering this case.[6] Consequently,

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[6] Plaintiff's Court of Appeals Brief did not assert that the District Judge erred by finding, on the materials presented, that Ford did not violate the Master Agreement and that the Unions did not unfairly represent plaintiff. In his Petition, plaintiff merely suggests that Ford breached its Master Agreement with the UAW by laying off others (p. 7). No *facts* are presented to support that conclusion. Plaintiff agreed below that the crux of both of his suits was his view that three local seniority Agreements violated the Ford-UAW Master Agreement (A .3). This Court holds that the discretion of Unions is especially great in the negotiation and administration of agreements concerning seniority. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); and *Humphrey v. Moore*, 375 U.S. 335, 349, 350 (1964).

Respondents will not discuss the merits of the substantive issues.

We do emphasize that the District Judge *independently* and thoroughly considered and rejected plaintiff's charges of unfair representation (A .22-.24), and plaintiff's contractual arguments (A .24-.28).

The District Court considered the applicable Master and local Agreements as well as an Affidavit and other material. Plaintiff filed no contra material other than conclusionary denials of defendants' defenses. Under such circumstances, Rule 56(e) mandated summary judgment for defendants (B .1, .2).

Based upon the record in this case, the Unions submit that the Court of Appeals correctly held that the District Court properly granted defendants' Motions for Summary Judgment under Rule 56(b), (c) and (e), FRCP.

CONCLUSION

For the foregoing reasons, the Union Respondents submit that the writ should not issue; said Respondents also request costs pursuant to Rule 57 of this Court's Rules.

Respectfully submitted,

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Jordan Rossen, Associate General Counsel
By: /s/ Jordan Rossen
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Of Counsel:

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Leonard R. Page
Anne Trebilcock
Marley Weiss
M. Jay Whitman
Assistant General Counsel

Dated: April 25, 1975

APPENDIX OF RESPONDENT UNIONS IN OPPOSITION

PORTIONS OF RULE 56, FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

• • •

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory of character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

• • • • •

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirma-

tively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

PORTIONS OF TRANSCRIPT OF HEARING OF AUGUST 13, 1973

(1)

Boris Thomas, Plaintiff, vs. Ford Motor Company, a Delaware corporation, and International Union, UAW, a union organization, and Local 600, UAW, a union organization, Defendants.	Civil Action Numbers: 39879 and 40129

Proceedings had and testimony taken in the above-entitled cause before the Honorable John Feikens, United States District Judge, at Detroit, Michigan.

Appearances:

Weiswasser & Barnard
By: Theodore Weiswasser, Esq.
Travelers Tower, Suite 1701
Southfield, Michigan 48076
Appearing on behalf of Plaintiff.

Jordan Rossen, Esq.
8000 East Jefferson
Detroit, Michigan 48214
Appearing on behalf of Defendant UAW.

(1A)

Joseph A. O'Reilly, Esq.
and
James R. Jackson, Esq.
The American Road
Dearborn, Michigan 48121
Appearing on behalf of Defendant Ford Motor Company.

• • • • •

(2) • • • • •

Mr. Weiswasser: Your Honor, Peter [sic] Weiswasser for the plaintiff.

I believe that we're here on an adjournment of this order to show cause, or this motion.

The Court: It's a motion to dismiss, is it not,

Mr. Weiswasser: Yes, sir, it is. In both instances it is a motion to dismiss. It was discussed and argued at some length the last time we were here.

The Court, if I recall, referred it to an adjourned time, in terms of what additional discussion or documentation would be prepared. At this time, I have nothing additional to present to the Court on the (3) Title VII action, which is the later action which was assigned to your Honor.

I would like to address a few additional words to the collective bargaining agreement.

• • • • •

19) The Court: The point I am getting at is that you're satisfied—and this is what I'm really testing with my questions—you're satisfied that you have furnished me with appropriate responses to each of the (20) points that have been raised.

Mr. Weiswasser: Well, the point, in particular, is covered by the exhibits, and it's well covered.

The Court: All right.

Is that true, now, as to the remaining points, also?

Mr. Weiswasser: Well, I believe that the points are covered in our—in responsive fashion in our answer.

The Court: Well, I want to know whether or not you feel you have completely and fully covered these points, and if you have, then what I'll do is take this matter under advisement and decide it.

Anything further, gentlemen?

Mr. O'Reilly: I have nothing further.

The Court: Mr. Rossen?

Mr. Rossen: Only one other comment, • • •

• • • • •

(21) The Court: All right.

Mr. Weiswasser: Thank you, your Honor.

• • • • •

The Court: All right, gentlemen. I'll take this matter under advisement.

PORTIONS OF TRANSCRIPT OF NOVEMBER 1, 1973 CONFERENCE

(3) Detroit, Michigan
Thursday, November 1, 1973

The Court: Let's put this on the record.

Boris Thomas versus the Ford Motor Company and International Union UAW Local 600, Civil Action Numbers 39879 and 40129.

Mr. Weiswasser appears in both cases for the plaintiff.

The International and Local is represented by Mr. Jordan Rossen, and the Ford Motor Company is represented by Joseph O'Reilly and Richard Maloy. (sic)

Then, for the record, Mr. Weiswasser, the plaintiff has no further papers to submit; is that correct?

Mr. Weiswasser: That's correct, sir.

The Court: Does the defendant union have anything further?

Mr. Rossen: No, your Honor.

I might say, in our initial motion, which we briefed, the complaint should be dismissed on the pleadings, we indicated that we would be agreeable, in fact, (4) that the Court

might have to treat this as a motion for summary judgment in the event that it went outside the pleadings.

The Court: I made no disposition of it at that time. That's why I was affording an opportunity—

Mr. Weiswasser: We have nothing else, your Honor.

The Court: Do you, Mr. O'Reilly?

Mr. O'Reilly: No, your Honor.

The Court: Then I will proceed to regard it as a motion under Rule 56 and dispose of it.

All right. Thank you for coming in, and I will issue an opinion shortly.

• • • • •

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No. 74-1251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

BORIS THOMAS, Individually and a member of a class
Petitioner,
v.
FORD MOTOR COMPANY, a Delaware corporation and International Union UAW, a union organization, and Local 600, UAW, a union organization,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT FORD MOTOR COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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THE ISLAND PRESS, DETROIT, MICHIGAN

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BRIEF OF RESPONDENT FORD MOTOR COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Question Restated

Whether this Court's Opinion in *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36 (1974) precludes the grant of Summary Judgment in suits brought pursuant to Title VII of the 1964 Civil Rights Act, 42 USC §2000 (e) *et seq.* if such proceedings are otherwise justified by the record?

Statement of the Case

Petitioner filed two actions in the District Court, naming both respondents as defendants in both actions. The first suit, filed March 29, 1973, was an action brought under Section 301 of the Labor Management Relations Act of 1947, 29 USC §185. The second suit, filed May 17, 1973, was brought under Title VII of the Civil Rights Act of 1964, 42 USC §2000 (e) *et seq.;* 42 USC §§1981 and 1983; and the Equal Protection Clause of the Fourteenth Amendment. The actions were consolidated on June 6, 1973.

Respondents moved to dismiss the consolidated complaints pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. Matters outside the pleadings were submitted in support of the motions. Thereafter, the trial judge informed the parties that, in accordance with Rule 12(b)(6), the motions would be treated as motions for summary judgment and disposed of as provided by Rule 56. After hearings on the motions and after having afforded all parties a reasonable opportunity to present all materials made pertinent by the decision to treat the 12(b)(6) motions as motions under Rule 56, the Court granted the motions and ordered the cases dismissed on November 7, 1973.

Upon appeal by Boris Thomas, the Court of Appeals affirmed the judgment of the District Court.

Reasons for Denying the Petition

The decision of the Court of Appeals is not in conflict with any decision of this Court or any other Court.

Petitioner argues that the decision of the Court of Appeals is in conflict with this Court's decision in *Alexander* v. *Gardner-Denver Company, supra.* It is not.

In *Gardner-Denver* this Court held that an employee's statutory right to trial *de novo* under Title VII of the Civil Rights Act of 1964 is not foreclosed by the prior submission of his claim to final arbitration under a nondiscrimination clause in a collective bargaining agreement. The Court did not say that in each instance of a claimed violation of Title VII that there must be a trial *de novo* and that the Federal Rules of Civil Procedure were abrogated to the extent of disallowing motions to dismiss or for summary judgment.

The Court of Appeals correctly determined that,

> Nowhere in *Gardner-Denver* did the Court hold or intimate that after an action for discrimination in employment is brought in a federal court the court may not dispose of the action by summary judgment if such proceedings are otherwise justified by the record. (Pet. App. 10-11.)

Both the District Court and the Court of Appeals correctly determined that summary judgment was appropriate in this case as there were no genuine issues as to any material fact and defendants were entitled to judgment as a matter of law.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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April, 1975